

IN THE DISTRICT COURT OF THE UNITED STATES  
DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

UNITED STATES OF AMERICA, ) 2:11-CR-511  
)  
Plaintiff ) Charleston,  
) South Carolina  
VS ) November 12, 2014  
)  
JIAN-YUN DONG, et al, )  
)  
Defendants )

TRANSCRIPT OF TRIAL EXCERPT  
BEFORE THE HONORABLE C. WESTON HOUCK,  
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical shorthand,  
Transcript produced by computer-aided transcription.

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THE COURT: Mr. Williams said you had no further witnesses.

MR. KLUMB: Right. Mr. Vaughn.

THE COURT: I'm sorry. I said I'll rule on the admissibility of that, and if I rule that out, then you can close in the presence of the jury.

MR. KLUMB: Okay. Thank you.

THE COURT: Give me just a minute.

MR. KLUMB: May I supplement the record with one thing? Can I give you -- I'll give you a copy of Exhibit 190, which is the summary chart that contains the, I submit, the true content of Mr. Vaughn's testimony that has been provided before, beginning in October of '12, but this is the newly revised version, just so Your Honor can see what it is that the witness will be asked to introduce.

THE COURT: Well, have you furnished that to the defendant?

MR. KLUMB: Oh, yes.

THE COURT: When?

MR. KLUMB: The most recent revised version was yesterday.

THE COURT: What about that? My understanding from you was you've heard nothing from them since October the

1 23rd.

2 MR. MACE: No. No, Judge.

3 MR. KLUMB: I'm sorry?

4 MR. MACE: These updates, this is either the second  
5 or third update since the trial started, they have been  
6 sending us these spreadsheets.

7 THE COURT: Oh, this was given to you after the  
8 trial started?

9 MR. MACE: Yes, sir. There was one this morning, I  
10 guess, or last night.

11 MR. KLUMB: Right. What happened was when they  
12 notified me the week before trial that they had looked  
13 through their discovery materials and they didn't think that  
14 they had the disk that I felt they had -- because we had  
15 previously provided it to counsel -- when they notified me  
16 that they didn't have that disk, I e-mailed the materials to  
17 them promptly. It may have been the next day. And then I --  
18 that was the final edition prior to trial.

19 Then I -- Mr. Vaughn worked on it over the weekend  
20 in light of some of the occurrences at trial. It was  
21 revised. In light of the Court's comments, I may revise it  
22 again to make it more sanitized, less opinion, you know, in  
23 light of the Court's comments, but that's -- that is a  
24 different version, but it's the same type of summary that was  
25 provided back in 2012, just updated.

1 (Pause in proceedings.)

2 MR. KLUMB: Your Honor, when I said that we may be  
3 revising it in light of the Court's comments, I believe to a  
4 great extent that this is a summary schedule that doesn't  
5 have -- it has little, if any, opinion in it.

6 To the extent that it does have opinion, things like  
7 bad debt is unallowable, there is a comment like that in the  
8 schedule that you will see, I don't believe that that invades  
9 the province of the jury because it's not an issue of  
10 ultimate fact. He's basically crunching numbers based on the  
11 unallowability of bad debt, and he gives a citation in there,  
12 as well. And I will eliminate that entire column. And it  
13 would say, this is the category of expense, per GenPhar's  
14 records, this is how GenPhar categorizes expense. Here is an  
15 NAH, or a FAR guideline to look at that you can review. That  
16 will be one of the exhibits that Your Honor suggested we  
17 introduce. And then here is the dollar amount that's  
18 attributable to that category. And then here is how much the  
19 company had from nongrant-related sources per their books and  
20 records.

21 All of that, if we were to sanitize that one column,  
22 would be in the nature of a summary witness more than an  
23 expert opinion. And that can be done just by scratching a  
24 column, and then he does the math and that's that. So I  
25 would ask the Court to consider that alternatively.

1 THE COURT: The Government attempts to call  
2 Johnathan Vaughn as an expert witness to testify based upon  
3 an undated report with unnumbered pages, and the defendant  
4 objects to such testimony on the grounds that the Government  
5 has not complied with Rule 16 of the Criminal Rules of Civil  
6 Procedure concerning discovery and disclosure concerning this  
7 so-called expert witness.

8 It seems to me very clear that the defendants have  
9 requested disclosure of experts as well as disclosure of what  
10 those experts will testify to. The hearing that we had on  
11 October the 23rd, 2014 clearly evidenced the defendants'  
12 desire to have experts identified and to have information  
13 before it that told it what those witnesses were going to  
14 testify to. I think anyone hearing that request at that  
15 hearing should conclude that the defendant, though not  
16 specifically referring to Rule 16, intended that the  
17 information it was entitled to under Rule 16 was asked for at  
18 that hearing.

19 Rule 16(a)(G) under the title "Expert Witnesses"  
20 provides as follows: "At the defendant's request, the  
21 Government must give to the defendant a written summary of  
22 any testimony that the Government intends to use under Rules  
23 702, 703 or 705 of the Federal Rules of Evidence during its  
24 case-in-chief at trial. If the Government requests discovery  
25 under Subdivision (b)(1)(C)(ii) and the defendant complies,

1 the Government must, at defendant's request, give to the  
2 defendant a written summary of testimony that the Government  
3 intends to use under 702, 703 or 705 of the Federal Rules of  
4 Evidence as evidence at trial on the issue of the defendant's  
5 mental condition." Which of course is not applicable here.

6 I frankly don't believe that the Government has  
7 furnished to the defendant in a timely fashion the  
8 information required by Rule 16. We don't hear it much. We  
9 used to hear it when these rules first came out, or at least  
10 when they were young, that the purpose of these discovery  
11 rules was to prevent ambush and to prevent surprise at trial  
12 and to bring all of the facts that justice dictated to the  
13 forefront so that the jury could decide the case based on its  
14 merits and not on the basis of who was the best lawyer; who  
15 had the greatest surprises in store for the other side.

16 I had the privy to practice law for many years under  
17 the old ambush rule and I appreciated its advantages, but I  
18 also believe that there is a certain spirit to these  
19 discovery rules that requires a party to approach them with  
20 fairness, with honesty, and with a sincere desire to furnish  
21 the information that justice dictates and the spirit of these  
22 rules demand. And I don't think in this case we've got that.

23 It may be that somehow, some way, the defendant  
24 could have gotten this disk from the Government and maybe  
25 they could have deciphered it and gotten some information

1 about it, who the witness was, but it seems to me after the  
2 request was made at the December 23rd, 2014 hearing, the  
3 burden was on the Government to comply with that Rule and to  
4 comply with it promptly and completely and fairly and without  
5 any questions, and they did not do it.

6 And so I think in this particular case that they  
7 failed to comply with the Rule by giving adequate notice as  
8 required by Rule 16 of the Federal Rules of Criminal  
9 Procedure as to the calling of Johnathan Vaughn as an expert  
10 witness and I grant the defendants' motion to exclude him as  
11 a witness in this case.

12 MR. KLUMB: Your Honor, then may I offer him as a  
13 summary witness just based on his extraction of numbers out  
14 of the company records?

15 THE COURT: Well, we have permitted another witness  
16 to testify as a nonexpert by going to these documents and  
17 taking entries out that, as I said to Mr. Mace, either one of  
18 us could do or either you and I could do probably.

19 MR. KLUMB: Yes, sir.

20 THE COURT: And if that's the case, then that  
21 witness is not an expert, that witness is a nonexpert and he  
22 doesn't have to be qualified. But I'm not sure exactly what  
23 he's going to do. I understand what he did in his report and  
24 I don't really run into any problem with it, except I don't  
25 think you gave adequate notice. But as far as the first

1 three or four paragraphs as to his expertise, he was acting  
2 as an accountant. It was only in that paragraph where he  
3 started taking the law and putting it to the facts did he get  
4 in some trouble and would have had difficulty testifying even  
5 if I would have let it in.

6 But I don't know if there would be any objection to  
7 that, would there be?

8 MR. MACE: Yes, sir.

9 THE COURT: All right. On what grounds?

10 MR. MACE: Judge, I believe all the documents the  
11 Government's already introduced, there is no need for a  
12 summation witness now to come in and basically go through --  
13 there is no way he can testify without being an expert. His  
14 entire testimony, all of his knowledge of the entire case, is  
15 based on the premise he's going to testify as an expert. For  
16 the Government to now proffer him as a civilian or regular  
17 fact witness, I don't think it is possible for a fact witness  
18 to review all these documents and come up with an opinion.

19 THE COURT: The only thing I can tell you to do is  
20 if you want him to prepare a document like that, we've got a  
21 couple of days, he can prepare it, and we can look at it when  
22 we get back here Wednesday, or before that. And if you can  
23 fax it to me, fax it to counsel and explain what it is, and  
24 let's see what it is. And if I think that it advances the  
25 cause of truth in helping the jury decide this case, then I



1 have no problem letting it in.

2 Now, if I think it's -- the defendant is at a  
3 disadvantage and they can't refute it because of this late  
4 date, then that's another thing.

5 But the other thing that I notice now that I failed  
6 to mention earlier is that in the October 23rd hearing,  
7 Mr. Mace referred to the fact that Ms. Parham had just gotten  
8 a letter, an e-mail, I guess, getting a list of witnesses  
9 from the Government and there were no experts listed, and  
10 Mr. Vaughn's name appeared there. And they say they got no  
11 other communication from you except these updates to the  
12 trial. And I just think that needs to be noted in the  
13 record.

14 MR. KLUMB: Your Honor, I think there is -- I think  
15 the Court has possession of my e-mail of October 24th in  
16 which I indicate to them that Mr. Vaughn is our expert. I'm  
17 sorry. It's been handed to me. Right. What I did after  
18 October 23rd, because I was not part of the case when this  
19 all occurred in 2012, I went back and I asked the folks in  
20 Columbia for their -- for their transmittal of the note that  
21 Rule 16 notes, what we thought was the Rule 16 notes. I  
22 forwarded that on October 24th, 2014, and it included copies  
23 of the expert witness disclosures identifying Vaughn as an  
24 expert.

25 THE COURT: I need to see that. You know, I don't

1 want anybody reading me stuff off of something the sides of  
2 your hand.

3 MR. KLUMB: I'm sorry, Your Honor.

4 MR. MACE: That is the letter that I handed up to  
5 the Court earlier that they had e-mailed me on the 24th of  
6 October.

7 MR. KLUMB: Clearly identifying Vaughn as an expert  
8 witness the next day.

9 And I might also add that when I provided that  
10 witness list to counsel after a request that I do so, I  
11 specifically said that we reserve the right to change it; not  
12 that I did.

13 THE COURT: You specifically said what?

14 MR. KLUMB: The transmittal e-mail that included  
15 the exhibit list indicated that we reserve the right to  
16 change it. And when I was asked to provide it, I --

17 THE COURT: You don't have that right.

18 MR. KLUMB: Okay.

19 THE COURT: I mean, I don't know what right you are  
20 reserving. You don't have that right. I mean, if you do it  
21 in time, you do it according to the rules, fine. If you  
22 don't, you've got to get Court permission.

23 MR. KLUMB: I repeat again, Your Honor, the day  
24 after that hearing I sent them the expert witness disclosure  
25 identifying Vaughn clearly as an expert.

1 THE COURT: I don't think I have that.

2 Mr. Mace, I don't seem to have that.

3 MR. KLUMB: We can forward another one.

4 MR. WILLIAMS: We just sent it to the clerk. They  
5 can print it.

6 THE COURT: Now, I've got something here, it's --  
7 the second page is blank. It's one page. It starts off with  
8 Nathan Williams, Assistant U.S. Attorney, begin forward  
9 message from, etcetera. "Here you go. Vaughn's report and  
10 supporting spreadsheets was produced on October 11th, 2012 on  
11 a separate disk."

12 I don't think I have seen that.

13 MR. KLUMB: We provided Your Honor with that  
14 transmittal letter.

15 THE COURT: "Attached are copies of the expert  
16 witness disclosure notices that we previously served on your  
17 predecessor counsel. Karen, please put these on the  
18 discovery log and include them wherever."

19 MR. KLUMB: And those attachments I believe  
20 included --

21 THE COURT: So what you are asking me is to look at  
22 this. This is something that I haven't seen before?

23 MR. KLUMB: I thought actually that Mr. Mace had  
24 passed up the e-mail, but I don't think there will be any  
25 disagreement. The day after the hearing, on October 23rd, I

1 provided them with the Vaughn notice of expert witness  
2 disclosure and his CV. And I referenced where the materials  
3 were that had been provided two years earlier.

4 MR. MACE: Your Honor, Mr. Klumb sent an e-mail to  
5 myself the next day, it contained an expert disclosure letter  
6 regarding, I believe it's Kevin Porter, the doctor from Duke,  
7 the Porter CV, the same doctor from Duke, which is just his  
8 curriculum, and then the expert disclosure letter that Mark  
9 Moore sent back in 2012 to James Griffin, which I think I  
10 passed up to the Court, which is basically Johnathan Vaughn  
11 may be offered as an expert. It did not contain the  
12 summaries that I had asked for the day before related to the  
13 expert witnesses and did not contain any of the other Rule 16  
14 requirements. It was just simply the letter that Mark Moore  
15 had sent out and the CVs. There were no summaries.

16 THE COURT: That's the letter of October 26th, 2012?

17 MR. MACE: Yes, sir. That's what's attached to  
18 that letter.

19 THE COURT: And the DVDs it referred to in the  
20 letter of October 10th?

21 MR. MACE: No, sir. We did not get those DVDs at  
22 that time.

23 THE COURT: Now, what else did you say you got other  
24 than the letter?

25 MR. MACE: The CVs of Dr. Porter.

1 THE COURT: Oh, the CV, I'm sorry. Yeah.

2 MR. MACE: Just basically his resume, Your Honor.

3 THE COURT: Go ahead.

4 MR. KLUMB: From what I heard, they acknowledge  
5 that they knew the day after they made the request in court  
6 that we were offering Johnathan Vaughn as an expert.

7 THE COURT: Look, I've ruled on it. Giving his name  
8 is one thing; complying with the Rule as a summary is much  
9 more important. And I've ruled on it based upon the record  
10 as I see it. And I don't think you complied, and I so held  
11 and that's it.

12 Now, as far as this witness coming up with some  
13 nonexpert document, we'll just have to see Tuesday what he  
14 comes up with. If it's nonexpert, I don't know why you can't  
15 use it in your closing argument. I don't know why you need  
16 him, but we'll look at it then and see.

17 Anything further before we recess?

18 MR. MACE: No, sir, Judge.

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I certify that the foregoing is a correct transcript from the  
record of proceedings in the above-titled matter.

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Amy C. Diaz, RPR, CRR December 16, 2014  
S/ Amy Diaz